FIVE SUN TRADING SDN BHD v. MUHAMMAD SALLEHUDIN RAMLI & ORS

HIGH COURT MALAYA, SHAH ALAM
FAIZAH JAMALUDIN J
[CIVIL SUIT NO: BA-22NCVC-273-07-2019]
25 JANUARY 2023

Abstract – *(i) A directive by the State Director of Customs, Selangor for certain goods to be re-exported is in accordance with the law and within his inherent powers under the Customs Act 1967; (ii) A company retains its legal personality and corporate powers during liquidation until the completion of the liquidation process and the dissolution of the company. Therefore, it is lawful for a company to carry on the importation of goods even after a liquidation order has been issued and insolvency proceedings has been commenced against it.*

CUSTOMS AND EXCISE: *Seizure – Goods – Containers of goods without valid import licence seized by Customs Department – Company paid compound for all containers – Customs Department issued notices of release but containers not released – Whether directive by State Director of Customs, Selangor for goods to be re-exported in accordance with law and within his inherent powers – Whether continuous seizure of goods unlawful and invalid – Whether lawful for company to carry out business when insolvency proceedings had been commenced against it – Whether company entitled to claim for special, general and exemplary damages – Customs Act 1967, s. 3(2) & (3)*

The plaintiff had imported 20 containers of liquor and cigarettes ('goods') into the free zone area of Westport and Northport, Port Klang, Selangor. At the time the plaintiff imported the goods, its cigarette import licence was valid but its liquor import licence had expired. The plaintiff had applied for a renewal of its liquor import but the application was still being processed when the goods arrived at the free zone area. Jabatan Kastam DiRaja ('Customs') seized the 20 containers of goods because no valid import licence was produced. The first to fifth defendants, the investigating officers in respect of the 20 seized containers, issued letters of offer to compound for the sum of RM5,000 for each container. Pursuant to the plaintiff's appeal to the State Director of Customs, Selangor, the latter agreed to reduce the compound to RM1,000 per container and issued a directive for the goods in the containers to be re-exported to Singapore upon payment of the compound. The plaintiff paid the compound for all 20 containers and Customs issued notices of release for 18 out of the 20 containers. However, to date, Customs had not released any of the 20 containers to the plaintiff. The plaintiff demanded for the release of the containers. Customs, on behalf of the Director General of Customs ('sixth defendant'), informed the plaintiff

that the goods in the containers had been forfeited pursuant to the proviso in s. 131(3)(b) of the Customs Act 1967 ('Act') because the plaintiff failed to produce an import licence issued by the sixth defendant within 30 days from the day the compound was paid. The plaintiff's case was that the defendants' failure to release the 20 containers, after its payment of the compound for the containers and the issuance of notices of release, was wrong and unlawful. Hence, the plaintiff filed this action against the first to sixth defendants and the Government of Malaysia ('seventh defendant') for the continued seizure of the goods. The plaintiff sought the following reliefs: (i) a declaration that the continuous seizure of the goods from 23 May 2018 to date was unlawful and invalid; (ii) compensation in the sum of RM2,735,991, which was the equivalent to the value of the seized goods; (iii) damages covering the port charges, detention and demurrage and other ancillary costs relating to the seizure of the 20 containers from the date of the seizure to date; and (iv) general and exemplary damages. The issues that arose were: (i) whether the directive by the State Director of Customs, Selangor for the goods to be re-exported in accordance with the law and within his inherent powers under the Act; (ii) whether the continuous seizure of the goods in the 20 containers by Customs after payment of the compound, wrongful and unlawful; (iii) whether it was lawful for the plaintiff to carry out its business when insolvency proceedings had been commenced against it; and (iv) if the court finds the continuous seizure of the goods to be wrongful and unlawful, whether the plaintiff was entitled to claim for special, general and exemplary damages from the defendants. The defendants submitted that the containers were not released to the plaintiff after payment of the compound for the following reasons: (i) the plaintiff did not remove the said containers from Customs' control and there was no written application from the plaintiff for the containers to be released; (ii) the Director of Investigation Division, Customs Head Office had issued a directive to cancel the notices of release and 18 letters of cancellation were issued; and (iii) the plaintiff failed to produce an import licence for all the 20 containers within 30 days from the date of the payment of the compound for the export and/or re-export of liquor and cigarettes.

Held (declaring defendants' continuous seizure of plaintiff's liquor and cigarettes in 20 containers since 23 May 2018 to date unlawful and invalid):

(1) The Director General of Customs is empowered under s. 3(2) of the Act with 'superintendence of all matters relating to the customs' conferred on the Director General by s. 3(2) of the Act. Section 40 of the Interpretation Acts 1948 and 1967 ('IA') states that where a person is conferred a power under written law to do or to enforce the doing of any act or thing, the powers given are as reasonably necessary to enable the person to do the act or thing or to enforce the doing of the act or thing. Reading s. 40 together with s. 17A of the IA, it is implied that the

Director General 'superintendence of all matters relating to the customs' includes the power to issue directives that seized goods be re-exported upon payment of any compound offered by Customs under the Act. Section 3(3) of the Act expressly empowered Directors of Customs (and other listed therein) to exercise all the powers conferred on the Director General, except those in ss. 13B, 22 and 145 of the Act. Therefore, it followed that the State Director of Customs, Selangor had 'superintendence of all matters relating to the customs' in the State of Selangor. This power included the power to issue directives that seized goods be re-exported upon payment of compound for the said goods. Therefore, the directive made by the State Director of Customs, Selangor was in accordance with the law and within his inherent powers under the Act. (paras 38-42 & 54)

(2) The defendants' continuous seizure of the goods in the 20 containers after payment of the compound was wrongful and unlawful for the following reasons, *inter alia*: (i) the facts showed that the plaintiff had applied to the State Director of Customs, Selangor for the containers to be released for export to Singapore, which application was allowed. The first to fifth defendants had testified that the State Director of Customs, Selangor had permitted the goods to be re-exported because the plaintiff's import licence was in the process of being renewed by Customs. They also agreed that the State Director of Customs, Selangor's decision to allow the goods to be re-exported was in accordance with law; (ii) the defendants chose not to produce the Director of Investigation Division, Customs Head Office as witness. This court must make an adverse inference, under s. 114(g) of the Evidence Act 1950 that the oral evidence which could have been produced by calling the Director of Investigation Division, Customs Head Office would, if produced, be unfavourable to the defendants. The defendants failed to discharge their burden of proof that the Director of Investigation Division, Customs Head Office had directed the cancellation of the 18 notices of release and the issuance of the 18 cancellation letters; and (iii) under Customs (Prohibition of Exports) Order 2017 PU(A) 102/2017, no export licence was required for the export and/or re-export of liquor and cigarette. (paras 74, 80, 88, 89 & 103)

(3) The company retained its legal personality and corporate powers during liquidation until the completion of the liquidation process and the dissolution of the company. As the goods were imported within 180 days after the date of the liquidation order, the liquidator was empowered under the Companies Act 2016 to carry on the plaintiff's business of importing the goods without having to seek the authority of the court or the committee of inspection. It was not unlawful for the

plaintiff to have carried on the importation of the goods after the liquidation order had been issued and insolvency proceedings had been commenced against it. (paras 105, 109 & 110)

(4) The plaintiff was entitled to the following special damages: (i) the sum of RM1,533,249.80 which was equivalent to the value of the goods in 15 out of the 20 containers seized as compensation for the continued seizure of the goods; and (ii) the sum of RM39,320 being charges for demurrage and detention for container no. IPXU 3932405. The plaintiff's claim for container handling charges as special damages, general damages for damage to its reputation and exemplary damages were dismissed. (paras 159 & 160)

Case(s) referred to:

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors [2001] 2 CLJ 474 HC ***(refd)***

Browne v. Dunne [1893] 6 R 67 HL ***(refd)***

Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors [2009] 2 CLJ 286 HC ***(refd)***

Lembaga Kemajuan Johor Tenggara v. Kayu Sedia Sdn Bhd [2010] 1 LNS 101 HC ***(refd)***

Lower Mainland Dairy Products Adjustment Committee v. Crystal Dairy Ltd [1933] AC 168 ***(refd)***

Modern Freight Express v. Afzarizzal Abdul Wahab & Ors [2017] 8 CLJ 425 CA ***(refd)***

Ng Siew Lan v. John Lee Tsun Vui & Anor [2017] 2 CLJ 245 FC ***(refd)***

Noor Shariful Rizal Noor Zawawi v. PP [2017] 4 CLJ 434 CA ***(refd)***

Noraini Mohamed Hadi v. Pembangunan Tanah Dan Perumahan Sdn Bhd & Another Appeal [2021] 3 CLJ 518 CA ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Pembinaan SPK Sdn Bhd & Anor v. Conaire Engineering Sdn Bhd-LLC [2022] 4 CLJ 357 CA

Pepper v. Hart [1993] AC 593 ***(refd)***

Reigate v. Union Manufacturing Co [1918] 1 KB 592 ***(refd)***

Rookes v. Barnard (No 1) [1964] AC 1129 ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Sistem Televisyen Malaysia Bhd & Ors v. Nurullah Zawawi & Anor [2015] 9 CLJ 357 CA ***(refd)***

Syarikat Abdul Ghaffar Trading Sdn Bhd v. Societe Agro-Export Sahel-Sages [2022] 1 LNS 331 HC ***(refd)***

Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***

Legislation referred to:

Customs Act 1967, ss. 2, 3(1), (2), (3), 10F, 13B, 22, 115(1)(c), 128, 131(2), (3)(b)(ii), 132, 145

Customs (Prohibition of Imports) Order 2017, reg. 13, Twelfth Schedule Item 1 of Part II

Evidence Act 1950, ss. 73A(1), (2), (5), (6), 101, 102, 103, 106, 114(g)
Free Zones Act 1990, ss. 2, 7(b)
Interpretation Acts 1948 and 1967, ss. 17A, 40
Police Act 1967, s. 97

For the plaintiff - JR Ravendren & M Agalya; M/s J R Ravendren & Assocs
For the defendants - Noerazlim Saidil; SFC

Reported by Lina E

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] In July 2017, 20 containers of liquor and cigarettes (the "goods") that were imported by the plaintiff into the free zone area of Westport and Northport, Port Klang, Selangor were seized by the Jabatan Kastam DiRaja ("Customs").

[2] In April 2018, the first to the fifth defendants, as senior officers of Customs, made written offers to the plaintiffs to compound the 20 seized containers for the sum of RM5,000 each per container.

[3] Pursuant to the plaintiff's letters of appeal dated 2 and 16 May 2018 to the State Director of Customs, Selangor, the latter agreed to reduce the amount of compound to RM1,000 per container and issued a directive for the goods in the containers to be re-exported to Singapore upon payment of the compound.

[4] The plaintiff paid the compound for all 20 containers. And Customs issued Notices of Release for 18 out of the 20 containers upon payment of the compound by the plaintiff.

[5] However, to date, customs have not released any of the 20 containers to the plaintiff.

[6] The plaintiff had filed this action against the first to the fifth defendants, the Director General of Customs and the Government of Malaysia, for the continued seizure of the goods. It is seeking the following reliefs:

(i) a declaration that the continuous seizure of the goods from 23 May 2018 to date is unlawful and invalid;

(ii) compensation in the sum of RM2,735,991, which it pleads is equivalent to the value of the seized goods;

(iii) damages covering the port charges, detention and demurrage and other ancillary costs relating to the seizure of the 20 containers from the date of the seizure to date; and

(iv) general damages and exemplary damages to be assessed by this court.

A **Issues**

[7] There are four issues to be tried in this action:

(i) Was the directive by the State Director of Customs, Selangor for the goods to be re-exported in accordance with the law and within his
B inherent powers provided under the Customs Act 1967 (Act 235) ("Customs Act")?

(ii) Was the continuous seizure of the goods in the 20 containers by Customs after payment of the compound wrongful and unlawful?

C (iii) Was it unlawful for the plaintiff to carry out its business when insolvency proceedings had been commenced against it? and

(iv) If the court finds the continuous seizure of the goods to be wrongful and unlawful, is the plaintiff entitled to claim for special damages, general damages and exemplary damages from the defendants?

D **The Facts**

[8] The plaintiff had imported 20 containers of the goods into the free zone area of Westport and Northport, Port Klang, Selangor from 9 June to 9 October 2017.

E **[9]** The plaintiff had a cigarette import licence valid from 26 January to 31 December 2017 and a liquor import licence valid from 15 February to 10 June 2017. At the time the plaintiff had imported the goods into the free zone area of Westport and Northport, its cigarette import licence was valid. However, its liquor import licence had expired. The plaintiff had applied for
F a renewal of its liquor import licence in June 2017, but the application was still being processed when the goods arrived at the free zone area.

[10] Under para. 6(2) of Part I of the Third Schedule of the Customs (Prohibition of Imports) Order 2017 PU(A) 103/2017 ("Import Prohibition Order 2017"), a valid import licence must be produced for the import of
G liquor and cigarettes during the importation into Malaysia or movement of liquor and cigarettes. Customs seized the 20 containers of goods because no valid import licence was produced when the goods were imported into the free zone area of Westport and Northport. The plaintiff contends that no import licence needs to be produced while the products are in the container
H yard in the free zone area.

[11] The first to the fifth defendants were appointed as investigating officers in respect of the 20 seized containers. All five defendants were called as the defendants' witnesses during the trial. They are respectively referred to in this judgment as "DW1", "DW2", "DW3", "DW4" and "DW5". DW1 to
I DW5 had on 24 and 25 April 2018, issued letters of offer to compound for the sum of RM5,000 for each container. The letters were issued pursuant to their powers under s. 131(2) of the Customs Act.

[12] The plaintiff, in its letter of 2 May 2018, appealed to the State Director of Customs, Selangor, Dato' Sarip bin Ismail for a reduction to RM1,000 of the compound payable per container. Dato' Sarip bin Ismail was called as a subpoena witness by the plaintiff during the trial. He is referred to as "PW1" in this judgment.

[13] In another letter dated 16 May 2018, plaintiff requested from PW1 permission to allow it to re-export the goods in the containers on the grounds that it applied for the renewal of the liquor import licence in June 2017, but the application for renewal was still being processed by Customs almost a year later. PW1 allowed the re-export of the goods upon payment of the compound.

[14] On 18 May 2018, DW1 on behalf of PW1, issued the plaintiff letters of offer to compound the containers at a reduced amount of compound of RM1,000 per container.

[15] The plaintiff paid the sum of RM1,000 as compound for each of the 20 containers. DW1 to DW4 then issued notices of release for 18 out of the 20 containers. The wordings of the notices of release issued in respect of each of the 18 containers are produced below:

Jabatan Kastam DiRaja Malaysia Selangor

Rujukan Kami:
Tarikh:

Five Sun Trading Sdn Bhd
No. 3904 Jalan Bagan Luar
12200 Butterworth
Pulau Pinang

Notis Pelepasan Kontena

Saya dengan in mengaku menerima kontena dan dagangan yang tersebut di bawah di dalam keadaan baik dan teratur yang telah diserahkan kepada saya mengikut perintah **Pengarah Kastam Negeri, Jabatan Kastam Diraja Malaysia, Selangor.**

2. **Butir-Butir dagangan/barang:**

2.1 No. Kontena: (Container No.)

3. Dengan ini saya mengenepikan semua tuntutan apa jua jenisnya yang mungkin saya buat terhadap Jabatan Kastam Diraja Malaysia atau sebarang pegawainya, berhubung dengan atau yang timbul daripada kualiti, kuantiti atau keadaan kontena dan dagangan tersebut.

… …

Tandatangan Pegawai Penyerah
Tarikh:

…
Tandatangan Saksi

Tandatangan Penerima:
Nama:
No. KP:
Tarikh

Tarikh:

s.k. Ketua Unit, Container Control Unit (CCU)

Urusetia CCU
Sila lepaskan kontena terlibat. Kes selesai disiasat.

TT
Penguasa Kastam
Bahagian Penguatkuasaan, Selangor

[16] On each notice of release, the Unit Kawalan Kontena ("CCU") was instructed to release the container detailed in the said notice.

[17] The plaintiff's agent, Senthil Kumar a/l Rajagopal ("PW2") was the receiver (penerima) who had acknowledged receipt of all 18 containers. The Customs officers who had signed the notices of release were DW1, DW2, DW3 and DW4 respectively. Details of the dates of each notice of release, the defendant who had issued the notice and the containers numbers are listed below:

	Notice of Release		Container No.
	Date	Issued By	
1.	15.05.2018	DW4	OOLU 0422765
2.	15.05.2018	DW4	SEGU 1004252
3.	23.05.2018	DW1	GESU 2133630
4.	23.05.2018	DW1	IPXU 3932404
5.	23.05.2018	DW1	ECNU 2304955
6.	23.05.2018	DW1	TEMU 3434562
7.	23.05.2018	DW1	MOAU 6767786
8.	23.05.2018	DW1	NYKU 3793611
9.	23.05.2018	DW1	APZU 3086075
10.	23.05.2018	DW1	TGHU 2928508
11.	23.05.2018	DW1	NIDU 2224166
12.	23.05.2018	DW1	THRU 3250152
13.	23.05.2018	DW2	MHSU 2456355
14.	23.05.2018	DW3	DRYU 2842757
15.	23.05.2018	DW3	DRYU 2842905

	Notice of Release		Container No.
	Date	Issued By	
16.	23.05.2018	DW2	EISU 3787862
17.	23.05.2018	DW2	MHSU 2250880
18.	23.05.2018	DW2	MHSU 2248224

[18] Approximately a month after issuing the 18 notices of release, in a letter dated 27 June 2018 ("June 2018 letter"), DW2 wrote a letter to the Head of CCU, instructing the CCU not to release the containers until further notice. In Lampiran A of the letter, DW2 had listed 20, instead of 18, notices of release for the containers. The additional two notices of release were for the remaining two of the 20 containers. The additional notices of release are listed below.

	Notice of Release		Container No.
	Date	Issued By	
19.	No details	DW5	OOLU 0474060
20.	No details	DW5	OOLU 02347704

[19] In the June 2018 letter to the CCU, DW2 wrote:

> 2. … Pihak syarikat terbabit telah menjelaskan tawaran kompaun dan telah diberi Notis Pelepasan oleh Pegawai Penyiasat pada 15.08.2018 hingga 23.05.2018 untuk dieksport semula. Namun Ibu Pejabat telah mengeluarkan arahan supaya Notis Pelepasan kontena-kontena tersebut dibatalkan.
>
> No. Kontena: Sila rujuk "Lampiran A"
>
> 3. Mohon pihak tuan untuk tidak memberi pelepasan dari sistem terhadap kontena-kontena sehingga arahan selanjutnya.

[20] In August 2018, the plaintiff, through a letter dated 2 August 2018, from its solicitors, Tetuan JR Ravendran & Associates, to the first to the sixth defendants, demanded the release of the containers.

[21] Customs on behalf of sixth defendant in its reply dated 21 September 2018, informed the plaintiff's solicitors that the goods in the container had been forfeited pursuant to the proviso in s. 131(3)(b) of the Customs Act because the plaintiff failed to produce an import licence issued by the sixth defendant within 30 days from the day the compound was paid.

A **The Plaintiff's Case**

[22] The plaintiff's case is that the defendants' failure to release the 20 containers, after its payment of the compound for the containers and the issuance of notices of release, was wrong and unlawful.

B **The Defendants' Case**

[23] The defendants' defence is that the notices of release were cancelled because the plaintiff failed to produce an import license within 30 days after paying the compound.

C **[24]** The defendants plead that on the directions of the Director of Investigation Division, Customs Head Office (Pengarah Cawangan Siasatan Ibu Pejabat), the notices of release were cancelled, and 18 letters of cancellation were issued.

[25] The defendants plead that the goods in the 20 containers were disposed
D of in accordance with ss. 115(1) and 131(3)(b)(ii) of the Customs Act because the plaintiff failed to produce an import licence within 30 days from the date of the payment of the compound.

[26] The defendants' alternative plea is that the plaintiff's importation of the seized goods was wrongful because it was a company in liquidation
E pursuant to an order of the Penang High Court of 8 May 2017.

Issues For Determination

Issue (I): Was The Directive Of The State Director Of Customs, Selangor For The Goods To Be Re-exported In Accordance With The Law And Within His Inherent
F *Powers Provided Under The Customs Act?*

[27] To enable it to decide on this issue, this court must consider the following sub-issues:

(i) Does the State Director of Customs Selangor have the power under the Customs Act to issue a directive that the goods are to be re-exported
G upon payment of the compound?

(ii) Does the Customs' Perintah Tetap Penguatkuasaan Bil. 43 berkenaan dengan "Pelupusan Barang Sitaan dan Lucuthak ("PTP 43") have the force of law?

H *Does The State Director Of Customs Selangor Have The Power Under The Customs Act To Issue A Directive That The Goods Are To Be Re-exported Upon Payment Of The Compound?*

[28] The Director General of Customs and the State Directors of Customs are appointed under s. 3(1) of Customs Act.

I

[29] The Director General is the Chief Officer of Customs and pursuant to s. 3(2) of the Customs Act has "the superintendence of all matters relating to the customs, subject to the direction and control of the Minister".

[30] The Directors of Customs are subject to the general direction and supervision of the Director General. Under s. 3(3) of the Customs Act, they are empowered to exercise all the powers conferred on the Director General, except those in ss. 13B, 22 and 145 of the Customs Act. Section 3(3) of the Customs Act, in force at the material time, reads as follows:

> (3) The Deputy Directors General, Assistant Directors General, Directors, Deputy Directors, Senior Assistant Directors and Assistant Directors shall be subject to the general direction and supervision of the Director General, and, subject thereto, shall have and exercise all powers conferred on the Director General by or under this Act, other than those conferred by sections 13B, 22 and 145 thereof.

[31] Pursuant to ss. 13B, 22 and 145 of the Customs Act, only the Director General has the power to (i) make a customs' ruling, (ii) decide on questions in respect of goods deemed dutiable, and (iii) issue the forms to be used under the Customs Act.

[32] Save for these three powers, in accordance with s. 3(3) of the Customs Act, the Assistant Directors General, Directors, Deputy Directors, Senior Assistant Directors and Assistant Directors "have and exercise all the powers" of the Director General of Customs.

[33] Section 17A of the Interpretation Acts 1948 and 1967 (the "Interpretation Act") requires the Court to adopt a purposive approach in the interpretation of statutes. Section 17A reads:

> 17A. Regard to be had to the purpose of the Act
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[34] In *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97, the Court of Appeal held s. 17A of the Interpretation Act requires the court to take a purposive approach in the interpretation of statutes, including taxing statutes. Haidar Mohd Noor CJ (Malaya) at p. 272g of [2004] 2 CLJ 265 held:

> It was clear beyond doubt that s. 17A of the Interpretation Acts 1948 and 1967 is a statutory recognition for the courts to take a purposive approach in the interpretation of statutes including taxing statutes.

Steve Shim CJ (Sabah & Sarawak) at p. 276b of [2004] 2 CLJ 265 held:

> Section 17A of the Interpretation Acts 1948 and 1967 enjoins the purposive approach to statutory interpretation. This applies to all statutes including taxing statutes.

A And Gopal Sri Ram CJA at p. 299 to 300 of [2004] 2 CLJ 265 held:

> Parliament *via* s. 17A of the Interpretation Acts 1948 and 1967 requires the court to adopt a purposive approach. … So, there is no doubt that even a taxing statute must be given a purposive approach.

B Their Lordships cited with approval the House of Lords' decision in *Pepper v. Hart* [1993] AC 593, where Lord Griffiths there said:

> The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and
C are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.

[35] Additionally, the Court of Appeal held that the applicable test as to whether a particular written law is a taxing statute is the test that was formulated by Lord Thankerton in the Privy Council judgment in *Lower*
D *Mainland Dairy Products Adjustment Committee v. Crystal Dairy Ltd* [1933] AC 168, 175 ("Lord Thankerton's test") namely, that a written law is a taxing statute where the levies or duties imposed under the said written law are (i) compulsorily imposed; and (ii) they are enforceable by law.

E **[36]** The Customs Act imposes import duty, export duty, surtax, surcharge and cess: defined as "customs duty" in s. 2 of the Act. These customs duties are compulsorily imposed by the Act and are enforceable by law. Accordingly, based on the Court of Appeal's decision in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils* and Lord
F Thankerton's test, it is my considered judgment that the Customs Act is a taxing statute.

[37] The learned Senior Federal Counsel ("SFC"), Puan Noerazlim binti Saidil, had helpfully highlighted for this court in the defendants' bundle of authorities, the following passage in Gopal Sri Ram JCA judgment in *Palm*
G *Oil Research And Development Board Malaysia v. Premium Vegetable Oils* at p. 300a of [2004] 2 CLJ 265, where he held:

> In my respectful view, s. 17A of the Interpretation Acts 1948 and 1967 neatly fits into and is complementary with the third principle in the judgment of Lord Donovan. *Hence, the governing principle is this. When*
H *construing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process, the court is under a duty to adopt an approach that produces neither injustice nor absurdity: in other words, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein.* (emphasis added)

I **[38]** The Director General of Customs is empowered under s. 3(2) of the Customs Act with the "superintendence of all matters relating to the customs" conferred on the Director General by s. 3(2) of the Customs Act.

[39] Section 40 of the Interpretation Act states that where a person is conferred a power under written law to do or enforce the doing of any act or thing, the powers is understood to be also given as are reasonably necessary to enable the person to do the act or thing or to enforce the doing of the act or thing. Section 40 of the Interpretation Act reads:

> 40. Implied Powers
>
> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.
>
> (2) Without prejudice to the generality of subsection (1):
>
> (a) power to make subsidiary legislation to control or regulate any matter includes power to provide for the same by licensing and power to prohibit acts whereby the control or regulation might be evaded;
>
> (b) power to grant a licence, permit, authority, approval or exemption includes power to impose conditions subject to which the licence, permit, authority, approval or exemption is granted; and
>
> (c) where a power is conferred on any person to direct, order or require any act or thing to be done, there shall be deemed to be imposed on any person to whom a direction, order or requisition is given in pursuance of the power a duty to comply therewith.

[40] Thus, reading s. 40 together with s. 17A of the Interpretation Act, it is implied that the Director General's "superintendence of all matters relating to the customs" includes the power to issue directives that seized goods be re-exported upon payment of any compound offered by Customs under the Customs Act.

[41] Section 3(3) of the Customs Act expressly empowers Directors of Customs (and others listed therein) to exercise all the powers conferred on the Director General, except those in ss. 13B, 22 and 145 of the Act. Directors of Customs includes Directors of Customs of each State. Therefore, it follows that the State Director of Customs Selangor has "superintendence of all matters relating to the customs" in the State of Selangor. This power includes the power to issue directives that seized goods be re-exported upon payment of compound for the said goods.

[42] As held by the Court of Appeal in *Palm Oil Research And Development Board Malaysia v. Premium Vegetable Oils*, courts in interpreting taxing statutes are under a duty to adopt an approach "that produces neither injustice nor absurdity" *ie*, "an approach that promotes the purpose or object underlying the particular statute *albeit* that such purpose or object is not expressly set out the said statute".

[43] Although the Customs Act does not expressly state that the Director General of Customs and the Directors of Customs have the power to issue directives that seized goods be re-exported upon payment of any compound offered by Customs under the Act, in my considered judgment, any other interpretation of ss. 3(2) and 3(3) of the Customs Act would give rise to absurdity and would not promote the purpose or object underlying s. 3(2) in conferring the Director General of Customs "superintendence of all matters relating to the customs" and s. 3(3) in granting the Directors of Customs the powers and the right to exercise all powers conferred on the Director General under the Act, save for those in ss. 10F, 13B and 22 of the Act.

Does PTP 43 Have The Force Of Law?

[44] DW4 stated during the trial that PW1's decision to allow the goods for re-export on payment of the compound was not in accordance with the Perintah Tetap Penguatkuasaan Bil. 43 berkenaan dengan "Pelupusan Barang Sitaan dan Lucuthak ("PTP 43").

[45] The learned SFC submitted that PTP 43 has the force of law. Puan Noerazlim cited the case of *Noor Shariful Rizal Noor Zawawi v. PP* [2017] 4 CLJ 434; [2017] 3 MLJ 460; [2018] 5 AMR 679, CA, as the authority to support her argument. In *Noor Shariful Rizal*, the Court of Appeal held that the standing orders made by the Inspector-General of Police ("IGP"), which necessarily include the IGSO F103 acquire their statutory power from s. 97 of the Police Act 1967. Therefore, the IGP's standing orders has the force of law. Section 97 of the Police Act 1967 states:

> 97. Standing Orders
>
> The Inspector General may issue administrative orders, to be called "Standing Orders", not inconsistent with this Act or rules or Police Regulations made thereunder, for the general control, direction and information of the Force and of all bodies established or raised for police duties under this Act.

[46] With respect to the learned SFC, there is no equivalent provision in the Customs Act empowering the Director General of Customs to issue such administrative orders or standing orders as that conferred onto the IGP under the Police Act 1967.

[47] Furthermore, the facts show that the PTP 43 was not approved or issued by the Director General of Customs. The copy of the PTP 43 included by the defendants in their bundle of authorities shows that the document was prepared by the Ketua Jawatankuasa Pindaan PTP, it was checked by the Penolong Ketua Pengarah Kastam, and it was approved by the Timbalan Ketua Pengarah Kastam.

[48] Moreover, the PTP 43 was issued in March 2016. The Director General's power to make public rulings was only included in the Customs Act by the insertion of s. 10F by the Customs (Amendment) Act 2019 (the "2019 Amendment Act"), which came into effect on 1 January 2020. A

[49] Accordingly, for the above reasons, I find that PTP 43 does not have the force of law. B

[50] Additionally, the defendants did not plead in their amended defence that PW1's directive to dispose of the goods by way of re-export was not in accordance with PTP 43. The defendants' pleaded case is that the goods were not released to the plaintiff because the Director of the Investigations Division, Customs Head Office had directed that the notices of release be cancelled as the plaintiff did not produce an import licence within 30 days after payment of the compound. C

[51] Puan Noerazlim submitted that because counsel for the plaintiff did not object to DW4's testimony that PW1's directive for disposal of the goods by way of re-export was not in accordance with PTP 43, the evidence is admissible. She cited as authority the case of *Syarikat Abdul Ghaffar Trading Sdn Bhd v. Societe Agro-Export Sahel-Sages* [2022] 1 LNS 331; [2022] MLJU 298 ("*Syarikat Abdul Ghaffar Trading*"), where Tee Goek Hock JC held that because the defendant's counsel did not cross-examine the plaintiff's witness on when the damaged goods were discovered, the court must consider all the evidence that had been adduced at trial without any objection as to pleading. D E

[52] With respect to the learned SFC, I cannot agree with her argument for the following reasons:

(i) It is trite law that a litigant is bound by his pleadings: see the Federal Court's decision in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1; [2018] 3 AMR 259, FC. Pursuant to the principle of *stare decisis*, this court is bound by the decision of the Federal Court. Accordingly, the defendants cannot during re-examination of DW4 change their pleaded case to claim that the goods were not released because PW1's directive for re-export of the goods was not in accordance with PTP 43; F G

(ii) DW4 only gave his testimony during re-examination. Unlike in *Syarikat Abdul Ghaffar Trading*, counsel for the plaintiff in this instant suit, did not have the opportunity to cross-examine DW4 on the said testimony since it was given during re-examination and not during evidence in chief; and H

(iii) The defendants did not produce a copy of PTP 43 during the trial. The document was produced for the first time during the defendants' submission after the defendants had closed their case. The copy of the PTP 43 was not produced as a document by the defendant's during the trial but was part of the defendant's bundle of authority that I

accompanied learned SFC's written submissions filed after trial. The defendants' action in not producing the documents during trial and producing it as an authority after the conclusion of trial, denied the plaintiff the opportunity to challenge the maker of the PTP 43 of its content and authenticity. Therefore, pursuant to the Evidence Act 1950, PTP 43 is not admissible as evidence in this suit.

[53] As the document was not tendered as evidence during the trial, I further find that the copy of the PTP 43 submitted as the defendants' bundle of authority after trial, does not form part of the evidence in this suit.

Findings On Issue (I)

[54] For all the above reasons, I find that the directive made by PW1 as the State Director of Customs, Selangor, for the goods to be re-exported upon the plaintiff's payment of the compound was in accordance with the law and within his inherent powers under the Customs Act.

Issue (II): Was The Continuous Seizure Of The Goods In The 20 Containers After Payment Of The Compound Is Wrongful And Unlawful?

[55] DW1 to DW5 had offered the plaintiff to compound its offence under s. 131(2) of the Customs Act. The plaintiff had accepted the offer of compound and had paid for the compound.

[56] The defendants pleaded in their amended defence that the containers were not released to the plaintiff after payment of the compound for the following reasons:

(i) the plaintiff did not remove the said containers from Custom's control and there was no written application from the plaintiff for the containers to be released;

(ii) the Director of Investigation Division, Customs Head Office (Pengarah Cawangan Siasatan Ibu Pejabat) had issued a directive to cancel the notices of release and 18 letters of cancellation were issued; and

(iii) the plaintiff failed to produce an import licence for all 20 containers within 30 days from the date of the payment of the compound.

[57] In my view, the defendants pleaded reasons as to why they did not release the containers, give rise to the sub-issues below:

(i) Is an import licence required to re-export of the goods?

(ii) Did the plaintiff apply for the containers to be released?

(iii) Did the Director of Investigations Division, Customs Head Office issue a directive for the notices of release to be cancelled?

(iv) Can the notices of release be cancelled?

(v) Did the defendants dispose of the goods in accordance with ss. 115(1) and 131(3)(b)(ii) of the Customs Act?

Is An Import Licence Required To Re-export The Goods? A

[58] An import licence is required under the Import Prohibition Order 2017 for importing liquor and cigarettes into Malaysia at the time of import and movement of the goods.

[59] The defendants' case is that Customs had seized the containers because the plaintiff failed to produce a valid import licence at the time of import and movement of the goods into Malaysia. B

[60] The plaintiff's case is that based on the reading of the Import Prohibition Order 2017 together with the Free Zones Act 1990, the seizure was premature because the containers were in the free zone area at the time they were seized and had not yet been imported into Malaysia as the goods had not been move into the principal customs area. Learned counsel for plaintiff, Dato' JR Ravendren, argued that an import licence was not required when the goods were in the free zone area of Westport and Northport. C D

[61] Under the Import Prohibition Order 2017, an import licence for liquor and cigarettes must only be produced during the import or movement of the goods. Dato Ravendren submits that reg. 13 of the Import Prohibition Order 2017 read together with ss. 2 and 7 of the Free Zones Act 1990, enables the importer of the goods to produce the import licence to the proper customs officer either at the time of import or at the time of movement of the goods, including when the goods are moved out of the free zone area into any part of the principal customs area that is deemed to be imported into Malaysia. E

[62] "Free zone" and "principal customs area" are defined in s. 2 of the Free Zones Act 1990 as follows: F

(i) "free zone" means any part of Malaysia declared under the provisions of sub-s. 3(1) to be a free commercial zone or a free industrial zone.

(ii) "principal customs area" means any part of Malaysia but excluding a free zone, Labuan, Langkawi and Tioman. G

[63] Under s. 7(b) of the Free Zones Act 1990, goods are deemed to be imported into Malaysia, when the goods are brought out of the free zone and taken into any part of the principal customs area. Section 7(b) of the Free Zones Act 1990 reads as follows: H

> 7. Goods deemed to be exported from or imported into, Malaysia
>
> (b) goods which are brought out of the free zone and taken into any part of the principal customs area shall be deemed to be imported into Malaysia.

I

[64] The plaintiff contends that since the goods were seized by Customs before they were moved from the free zone into the principal customs area, the goods have not been imported into Malaysia. Accordingly, under the Import Prohibition Order 2017, there was no requirement for the plaintiff to show a valid import licence for the goods while it was still in the free zone area.

[65] The learned SFC submits that under para. 6(2) of Part I of the Third Schedule of the Import Prohibition Order 2017, an import licence must be produced for goods that are in transit. She argues that the goods were seized because the plaintiff did not produce an import licence when the goods were in transit.

Were The Goods "In Transit" When They Were Seized By Customs?

[66] The defendants' argument raises the question of whether the goods were "in transit" at the time they were seized by Customs. Therefore, in deciding whether an import licence was required when the goods were in the free zone area, this court must first determine whether the goods were in transit when they were in the free zone area of Westport and Northport.

[67] The Customs Act in force at the time Customs seized the containers in 2017 defined the phrase "in transit" to mean:

> taken or sent from any country and brought into Malaysia by land, sea or air (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance.

The phrase "in transit" was later deleted from the Customs Act with effect from 1 January 2020 by the 2019 Amendment Act.

[68] It is trite that the applicable law governing any agreement, act or event is the law that was in force on the date the agreement, act and/or event took place. Accordingly, the parties are bound by the definition of the phrase "in transit" as was defined in the Customs Act at the time the goods were seized by Customs.

[69] In this instant case, it is not disputed that the plaintiff had brought the liquor and cigarette into the free zone area for purposes of importation into Malaysia. They were not brought into the free zone area "for the sole purpose of being carried to another country".

[70] The Customs Act is a taxing statute. As discussed earlier, courts in interpreting taxing statutes are under a duty to adopt an approach that produces neither injustice nor absurdity. Based on the facts and the definition of the phrase "in transit" in the Customs Act that was in force in 2017, I find that it would be unjust and absurd for this court to conclude that the goods in the free zone area were in transit when were seized by Customs.

[71] Furthermore, under ss. 101 and 102 of the Evidence Act, the burden of proof is on the defendants to prove that the goods were in transit when they were seized. The defendants did not produce any evidence during the trial that the goods were in transit when they were seized. None of the defendants' witnesses testified that the goods in the containers were in transit *ie*, they were "brought into Malaysia for the sole purpose of being carried to another country" when they were seized in the free zone area. PW1's evidence was that the plaintiff had imported the goods into Malaysia but before the plaintiff could fill up the Borang ZB1 for the Zone Authority under the Free Zons Act 1990 and Borang Kastam No. 1 for the importation of the goods into the principal customs area, the goods were seized by Customs in the container yard of the free zone area.

[72] For these reasons, I find that the goods were not in transit when they were seized by Customs.

Is An Export Licence Required For The Export/Re-export Of Liquor And Cigarette?

[73] Under Customs (Prohibition of Exports) Order 2017 PU(A) 102/2017 ("Export Prohibition Order 2017"), no export licence is required for the export of liquor and cigarette. DW1, DW2, DW3, DW4 and DW5 all agreed under cross-examination during the trial that an export licence is not required to export liquor and cigarettes.

[74] Similarly, under the Import Prohibition Order 2017, no import licence is required to re-export liquor and cigarettes.

[75] Section 131(3)(b)(ii) of the Customs Act, states:

> (3) On the payment of such sum of money:
>
> (b) any property seized shall be released and no further proceedings shall be taken against such property except that:
>
> (ii) if the property consists of prohibited goods, such goods or the amount secured under paragraph 115(1)(a) or (b) or the amount realized by sale under paragraph 115(1)(c), as the case may be, shall be forfeited.
>
> Provided that where the prohibition is conditional upon a licence being issued, a senior officer of customs may release the goods if a licence issued by the relevant authority within thirty days from the date such sum of money is paid.

[76] I find that as neither an export licence nor an import licence is required for the export and/or re-export of liquor and cigarettes, the defendants were obliged, pursuant to s. 131(3)(b) of the Customs Act, to have released all the containers to the plaintiff after it had paid the compound for the containers.

[77] The option for the customs officer to "may release" the goods in the proviso to s. 131(3)(b) is only available if the goods require a licence under the law. Liquor and cigarettes do not require an import or export licence to be re-exported. Therefore, the proviso to s. 131(3) of the Customs Act does not apply in this case.

[78] As the goods were not in transit when they were seized and as they do not require an import or export licence for them to be re-exported, I find that it was wrong and unlawful for the defendants not to have released the containers after payment of the compound on the grounds that the plaintiff did not produce an import licence within 30 days from the date of the payment of the compound.

Did The Plaintiff Apply For The Containers To Be Released?

[79] Another reason pleaded by the defendants as to why they did not release the containers was that there was no written application from the plaintiff for the containers to be released.

[80] The facts show that the plaintiff had applied to PW1 for the containers to be released for export to Singapore, which application was allowed by PW1. DW1 to DW5 testified during the trial that PW1 had permitted the goods to be re-exported because the plaintiff's import licence was in the process of being renewed by Customs. They also agreed that PW1's decision to allow the goods to be re-exported was in accordance with law.

[81] In addition, DW1 to DW5 had issued the notices of release for the containers and had given written instructions to Urusetia CCU of Customs Selangor to release the containers.

[82] Thus, I find no merit in the defendants' reason that they did not release the containers after the payment of the compound because there was no written application for the containers to be released.

Did The Director Of Investigations Division, Customs Head Office Issue A Directive For The Notices Of Release To Be Cancelled?

[83] Pursuant to ss. 103 and 106 of the Evidence Act 1950, the burden of proof is on the defendants to prove that the Director of Investigation Division, Customs Head Office had issued a directive to cancel the notices of release and that 18 letters of cancellation were issued. Section 103 of the Evidence Act reads:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[84] Whether or not the Director of Investigation Division, Customs Head Office had issued the directive to cancel the notices of release and whether the 18 letters of cancellation were issued is something within the knowledge of the defendants. Section 106 of the Evidence Act reads:

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

[85] The defendants did not produce any documents in court by the Director of Investigation Division, Customs Head Office directing the cancellation of the notices of release. Neither did they produce the purported 18 letters of cancellation.

[86] The letter produced by the defendants instructing the CCU not to release the containers after the notices of release were issued, was the June 2018 letter issued by DW2 (the salient contents of which are reproduced in para. [19] above). Contrary to the defendants' pleadings, DW2 stated the June 2018 letter that the Head Office (and not the Director of Investigation Division) had issued a directive that the notices of release be cancelled.

[87] The Director of Investigation Division is a material witness. His testimony is material in determining the fact as to whether he had issued a directive to cancel the notices of release and to issue the cancellation letters. Although the defendants had subpoenaed a Dato' Rumainor bin Sarif to testify as a witness, they elected not produce Dato' Rumainor as witness at trial. The learned SFC did not provide any explanation as to why she decided not to call Dato' Rumainor as a witness for the defence.

[88] As the defendants chose not to produce the Director of Investigation Division, Customs Head Office as witness, this court must make an adverse inference under s. 114(g) of the Evidence Act 1950 that the oral evidence which could have been produced by calling the Director of Investigation Division, would, if produced, be unfavourable to the defendants.

[89] Accordingly, for these reasons, this court finds that the defendants had failed to discharge their burden of proof that the Director of Investigation Division, Customs Head Office had directed the cancellation of the 18 notices of release and the issuance of the 18 cancellation letters.

Can The Notices Of Release Be Cancelled?

[90] From the plain and ordinary reading of the notices of release, they acknowledge receipts by the receiver (penerima) of the containers that had been released to him. It is also a statement by the receiver of the containers that he sets aside any action against Customs and its officers arising from the quality, quantity or the condition of the container and the goods therein. At the bottom of each notice is a written instruction by the Customs officer to Urusetia CCU to release the container.

[91] The notices of release expressly state the containers had been released (telah diserahkan) on the directive of State Director of Customs, Selangor pursuant to his powers under the Customs Act. DW1 to DW5 expressly agreed under cross-examination that the decision made by PW1 to permit the re-export of the goods was in accordance with his powers under the Customs Act.

[92] In para. 14(iii) of their amended defence, the defendants' pleaded "Arahan Pengarah Cawangan Siasatan Ibu Pejabat telah mengatasi arahan pelepasan kontena-kontena terbabit oleh Pengarah Kastam Negeri".

[93] I find that the question of whether the purported directive by Director of Investigation Division, Customs Head Office is superior to the directive by the State Director of Customs is moot. This is because the defendants did not provide any evidence that the Director of Investigation Division had indeed issued a directive that the notices of release be cancelled.

[94] As discussed above, the facts show that it was DW2 that had instructed CCU not to release the containers. In DW2's letter of June 2018 to CCU, he purported to write the letter on behalf of PW1.

[95] However, the defendants did not produce any evidence that PW1 had instructed DW2 to write the June 2018 letter on his behalf. Nor was PW1 questioned during cross-examination by the learned SFC as to whether he had instructed DW2 to issue a letter cancelling his own directive as State Director of Customs for the containers to be released for re-export upon payment of the compound. It is a well-established principle of law that stems from the English case of *Browne v. Dunne* [1893] 6 R. 67, HL on the need to challenge the testimony of a witness and the need to put the defendants' case to a witness. This principle has been accepted by our courts: see the Federal Court's decision in *Ng Siew Lan v. John Lee Tsun Vui & Anor* [2017] 2 CLJ 245; [2017] 2 MLJ 167; [2017] 2 AMR 352.

[96] For these reasons, this court finds the notices of release could not be cancelled. This court further finds that the defendants' decision to revoke and/or cancel the notices of release based on the DW2's June 2018 letter was wrong and unlawful.

Did The Defendants Dispose Of The Goods In Accordance With S. 115(1) And 131(3)(b)(ii) Of The Customs Act?

[97] DW1 to DW5 had admitted during the trial, and this court has found that neither an import nor an export licence was required for the goods to be re-exported. Thus, upon payment of the compound, the defendants were statutorily required under the Customs Act to release the goods to the plaintiff.

[98] However, the defendants said that they had disposed of the goods instead of releasing the goods. The defendants pleaded that the goods were disposed of in accordance with ss. 115(1) and 131(3)(b)(ii) of the Customs Act. Section 115(1)(c) of the Customs Act states:

> (1) Where any movable property has been seized under this Act, a senior officer of customs may, at his discretion:
>
> (c) sell or destroy the movable property, as appropriate in the circumstances, where it is a living creature or where, in the opinion of a senior officer of customs, it is a perishable or dangerous nature or likely

to speedily deteriorate in quality or value, and where it is sold, he shall hold the proceeds of sale to abide the result of any prosecution or claim, or a forfeiture under section 131, as the case may be.

[99] The learned SFC submitted that pursuant to para. 22 of the PTP 43, the method of disposal of liquor is by way of quotation/tender as approved by the Ministry of Finance ("MOF") or by destruction, and that cigarettes are to be disposed by destruction only.

[100] Pursuant to ss. 103 and 106 of the Evidence Act, the burden of proof is on the defendants to prove on a balance of probabilities that the liquor was disposed of either by way of sale through a quotation/tender or were destroyed, and that the cigarettes were destroyed.

[101] However, the defendants did not produce any evidence during the trial that the liquor was disposed of either by way of sale of the liquor pursuant to a quotation/tender, or by way of destruction. Neither was any evidence produced to prove that the cigarettes were destroyed. The defendants did not produce any documents evidencing the sale of the liquor or the destruction certificate of the liquor and/or cigarettes pursuant to s. 115(1)(c) of the Customs Acts.

[102] For this reason, I find that the defendants had failed to prove that they had disposed of the goods in accordance ss. 115(1) and 131(3)(b)(ii) of the Customs Act.

Findings On Issue (II)

[103] Accordingly, this court finds that as regards Issue (II), the defendants' continuous seizure of the goods in the 20 containers after payment of the compound is wrongful and unlawful.

Issue (III): Was It Unlawful For The Plaintiff To Carry Out Its Business When Insolvency Proceedings Had Been Commenced Against It?

[104] The defendants had pleaded in the alternative that it was unlawful for the plaintiff to have carried on its business of importing the goods when a liquidation order had been issued against it by the Pulau Pinang High Court on 8 May 2017. The learned SFC submitted that "Plaintif telah menyalahi undang-undang berkaitan syarikat yang digulung dalam menjalankan perniagaan pada masa matan tersebut."

[105] With respect to the defendants and the learned SFC, it is trite law that the company retains its legal personality and corporate powers during liquidation until the completion of the liquidation process and the dissolution of the company: see *Reigate v. Union Manufacturing Co* [1918] 1 KB 592.

[106] As held by the Court of Appeal in *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506; [2012] 1 MLJ 369; [2012] 1 AMR 149, a case which was cited by the learned SFC herself, the

effect of the liquidation order is to vest the company's corporate powers in the liquidator. The liquidator displaces the directors and is empowered to act on behalf of a company. The liquidator has the power to control the activities of the companies that is being wound up.

[107] Additionally, contrary to the learned SFC's submission, the plaintiff had not been wound-up (digulung) when the goods were imported. The plaintiff has not been wound-up – the liquidation order was cancelled on 27 August 2018.

[108] The liquidators' powers are set out in the Eleventh and the Twelfth Schedules of the Companies Act 2016. Item 1 of Part II of the Twelfth Schedule states that it is not necessary for the liquidator to obtain the authority of the court or the committee of inspection for the liquidator to so carry on the business of the company "during the one hundred and eighty days after the date of the winding-up order". The liquidation order is dated 8 May 2017. The goods were imported into the free zone area of Westport and Northport between 9 June to 9 October 2017.

[109] Accordingly, as the goods were imported within 180 days after the date of the liquidation order, the liquidator was empowered under the Companies Act 2016 to carry on the plaintiff's business of importing the goods without having to seek the authority of the court or the committee of inspection.

Findings On Issue (III)

[110] For these reasons, I find that it was not unlawful for the plaintiff company to have carried on the importation of the goods after the liquidation order had been issued and insolvency proceedings had been commenced against it.

Findings Of Liability

[111] For all the reasons above, court finds that the defendants' continued seizure of the goods in the 20 containers is wrongful and unlawful.

Damages

Issue (IV): Is The Plaintiff Entitled To Claim Special Damages, Exemplary Damages And General Damages From The Defendants?

[112] The fourth issue to be tried in this case is if the court finds the continuous seizure of the goods to be wrongful and unlawful, is the plaintiff entitled to claim for special damages, exemplary damages and general damages from the defendants.

Special Damages

Compensation For The Goods Wrongfully Seized

[113] The plaintiff in its pleadings had sought for compensation in the sum of RM2,735,991, which it states is equivalent to the value of the goods in the 20 containers that were seized by the defendants. However, after the trial, learned counsel for the plaintiff submitted that the plaintiff was claiming compensation for the value of goods in only 15 of the 20 containers. The amounts of the goods on the invoiced were converted from United States Dollars ("USD"), Euros ("EUR") and Singapore Dollars ("SGD") to Ringgit Malaysia ("RM") based on the exchange rate appearing on the Bank Negara Malaysia online portal on 11 October 2022.

[114] The total amount of compensation claimed by the plaintiff for the goods in the 15 containers is the sum of RM1,533,249. Details of the invoices, the containers and the amounts are detailed in the table below:

No	Invoice No	Container No	Amount	Total	Total (RM)
1.	IS-002772	EISU3787862	USD35,360.00	USD70,570.00	329,561.90
2.	IS-002771	MHSU2250880	USD35,210.00		
3.	170630E	ECNU 2304955	SGD52,316.00	SGD271,303.00	879,021.72
4.	JJT003A/2017	DRYU 2842757	SGD34,875.00		
5.	JJT003B/2017	DRYU 2842905	SGD34,875.00		
6.	DF17-00048	NYKU 3793611	SGD21,825.00		
7.	P1-00002703	NIDU 2224166	SGD35,325.00		
8.	JJT005A/2017	GESU 2133630	SGD34,875.00		
9.	JJT005B/2017	IPXU 3932404	SGD34,875.00		
10.	DF-17-00051	TEMU 3434562	SGD22,336.00		
11.	962175346	OOLU 0237704	EUR11,475.60	EUR22,920.00	103,827.60
12.	962177731	OOLU 0474060	EUR11,444,40		
13.	DF17-00206	SEGU 1004252	SGD22,808.50	SGD45,617.00	147,799.08
14.	DF17-00207	OOLU 0422765	SGD22,808.50		
15.	CYB20170717	APZU 3086075	USD,640.00	USD15,640.00	73,038.80
				TOTAL	**RM1,533,249.80**

[115] Pursuant to s. 132 of the Customs Act, the plaintiff is entitled to claim for damages equivalent to the payment of the value of the goods *in lieu* of the return of the seized goods and other reliefs if the continuous seizure/ detention of the said goods was made without reasonable or probable cause.

In *Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 7 MLJ 609; [2009] 2 CLJ 286, Zamani A Rahim J (as he then was) said:

> [24] As there was no reasonable cause before or at the time of seizure to justify the detention or continued detention of the repaired Honda/plaintiff motorcar, the plaintiff is entitled, not only, for an order that the repaired Honda/plaintiff motorcar be returned to him but also damages. Section 132 provides as follows: ...

[116] The Court of Appeal in *Modern Freight Express v. Afzarizzal Abdul Wahab & Ors* [2018] 8 CLJ 425; [2017] 6 MLJ 83 allowed the plaintiff's claim for unlawful seizure of goods for the defendant's non-compliance with s. 128 of the Customs Act by reason of its failure to refer the plaintiff's claim to the magistrate upon the expiry of one-calendar-month from the plaintiff's claim. The matter was remitted to the High Court for assessment of damages.

[117] In this instant case, during the trial, the defendants' witnesses did not dispute the value of the seized goods as invoiced. In *Lembaga Kemajuan Johor Tenggara v. Kayu Sedia Sdn Bhd* [2010] 1 LNS 101; [2010] 1 MLJU 102; [2010] AMEJ 0160, Vernon Ong J (as he then was) accepted, on a balance of probabilities, the valuation submitted by the plaintiff as it was unchallenged by the defendants.

[118] DW1 to DW5 admitted that they did not value the seized goods from the time the goods were seized until the issuance of the offer of compound in May 2018.

[119] Learned counsel for the plaintiff submitted that in the absence of any evidence to the contrary to challenge the value of the goods in the invoices, this court ought to accept the valuation as shown in the invoices produced by the plaintiff during the trial. Dato' Ravendren submitted that although the invoices were marked as "ID", the court may still decide on their admissibility. He cited as authority the case of *Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474; [2001] MLJU 125 ("*Sim Lim Holdings*").

[120] In *Sim Lim Holdings*, Ramly Ali J (as he then was) held that s. 73A(2) of the Evidence Act 1950 allows for the admittance of documents when the maker is not called if having regards to all the circumstances of the case the court is satisfied that undue delay or expense would otherwise be cause. His Lordship held that although the documents were marked as "ID", it did not stop the court from deciding on their admissibility.

[121] Section 73A(2) of the Evidence Act 1950 empowers a court to decide on the admissibility of documents at any stage of the proceedings having regard to all the circumstances of the case. Subsections 73A(2), (5) and (6) of the Evidence Act 1950 state:

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, *in lieu* thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

…

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, …

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

[122] The court in *Sim Lim Holdings* found that the notices of demand, the AR cards and certificates of posting were admissible as evidence since the documents were part of a transaction or records that were consistent and were issued in the course of business and discharge of professional duty. Ramly Ali J held:

> At that stage of the proceedings [the trial], all those documents have to be marked as "ID" first, but it does not stop the court from deciding on their admissibility at the end of the trial *ie*, during submissions stage. Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power "at any stage of the proceedings, having regards to all the circumstances of the case". There is nothing to say that those documents cannot be admitted as evidence under s. 73A(2) just because they have only been marked as "ID".

[123] His Lordship said by virtue of ss. 73A(5) and 73A(6) of the Evidence Act 1950, the court in deciding whether all those documents are to be admitted as evidence considered with reasonable inference "from the form and contents of the document as well as from any related circumstances, as

to the accuracy or otherwise of the statement and in particular to the question whether or not the statements or the documents were made contemporaneously with the occurrence or existence of the facts stated."

[124] The Court of Appeal in *Noraini Mohamed Hadi v. Pembangunan Tanah Dan Perumahan Sdn Bhd & Another Appeal* [2021] 3 CLJ 518; [2021] 4 MLJ 152; [2020] AMEJ 0604 ("*Noraini Mohamed Hadi*") cited with approval Ramly Ali J's decision in *Sim Lim Holdings*. It reiterated that s. 73A(2) of the Evidence Act 1950 allows a judge to exercise his discretion to dispense with the maker of the document and s. 73A(5) allows the court to draw any reasonable inference from the form or contents which the statement is contained, or from any other circumstances.

[125] In another recent decision in *Pembinaan SPK Sdn Bhd & Anor v. Conaire Engineering Sdn Bhd-LLC* [2022] 2 MLJ 659; [2022] 4 CLJ 357 ("*Pembinaan SPK Sdn Bhd*"), the Court of Appeal again cited with approval Ramly Ali J's decision in *Sim Lim Holding*s. It held that the High Court Judge was not plainly wrong in admitting the trade licenses, which were originally marked as "ID" during trial, into evidence pursuant to ss. 73A(1) and (2) of the Evidence Act 1950.

[126] The facts relating to the admissibility of documents in this instant case are similar to that in *Sim Lim Holdings*. Like in *Sim Lim Holdings*, counsel for the plaintiff in this case had attempted to produce all the invoices and the packing lists as evidence but it was objected to by the learned SFC. During the trial the invoices and the packing lists were marked as "ID" first. Hence, this court has to decide on the admissibility of the invoices at the end of the trial during the submissions stage *ie*, after considering all the circumstances of the case.

[127] In this instant case, the bills of lading, the arrival notices and the tax invoices for the 15 containers were admitted as evidence during the trial and marked exhs. "P5", "P6" and "P7" respectively. The invoices and the packing lists were marked as "ID8" and "ID9" respectively.

[128] After having regard to all the circumstances of this case, I am satisfied that undue delay to this trial and expense would be caused if the makers of all the invoices are called as witnesses.

[129] The learned SFC had objected to the inclusion of invoice no. IS-002772 (item 1 in the table above) and the invoice no. CYB20170717 for container no. APZU 3086075 (item 15 in the table above) as evidence in this suit.

Invoice No. IS-002772

[130] Puan Noerazlim objected to the inclusion of invoice no. IS-002772 (at bundle B/pg.139) because she says that the invoice does not have a notation for container no. EISU 3789862.

[131] In the bill of lading for container no. EISU 3789862 (at bundle B/p. 88), the goods are described as "1,286 cartons of cigarette and alcoholic beverages". In invoice no. IS-002772, the goods are described as "Carlsberg beer GL Can, 5%" and the "Zon King full flavour", and the quantity are of the beer and cigarettes is stated as 1,286 – which is the same as that stated on the bill of lading for container no. EISU 3789862 and the packing list.

[132] The learned SFC stated that there are two packing lists no. IS-002771. Because the number of goods stated on packing list in bundle B/p. 140 is the same as invoice no. IS-002772 and the bill of lading for container no. EISU 3789862, it can be reasonably inferred that there is a typo in the packing list on p. 140 – it should have been numbered as IS-002772. Also, because the packing list on p. 142 is correctly numbered as IS-002771 based on the quantity of the goods in container no. MHSU2250880 stated on the bill of lading, the invoice and the packing list.

[133] Therefore, this court has drawn a reasonable inference that because the quantity of goods stated on the invoice and the bill of lading are the same, invoice no. IS-002772 is for the goods in container no. EISU 3789862.

Invoice No. CYB20170717 For Container No. APZU 3086075

[134] The learned SFC had also objected to the invoice no. CYB20170717 for container no. APZU 3086075. She submitted that the invoice on bundle C/p. 6 does not have container no. APZU 3086075.

[135] The quantity and the weight of the beer are the same on the arrival notice and the packing list. Also, the invoice number and date are stated on the arrival notice, and the name of the vessel and the container number are the same on the arrival notice and the packing list.

[136] Accordingly, I find that it can be reasonably inferred that invoice no. CYB20170717 is for the goods shipped in container no. APZU 3086075, on the vessel APL Atlanta from Shanghai to Port Klang.

[137] After considering all the circumstances of this case, this court pursuant to its powers under s. 73A(2) of the Evidence Act 1950, orders that the copies of invoices and the packing lists for the goods in the 15 containers detailed in the table above and marked as "ID8" and "ID9" during the trial, be admitted as evidence.

[138] In making the order that the copies of the said invoices and the packing lists be admitted as evidence, this court has drawn a reasonable inference under s. 73A(5) of the Evidence Act 1950 from the fact that the invoices and the packing lists for the goods in the respective containers were made contemporaneously (i) as part of the same business transactions with the bills of lading (marked as "P5"); and (ii) in the normal course of business in international shipping transactions.

[139] For these reasons, I find that based on the invoices that had been admitted as evidence that the amount of compensation that the plaintiff is entitled to from the defendants for its continued seizure of the goods is the sum of RM1,533,249.80.

Demurrage And Detention For Container No. IPXU 3932405

[140] The plaintiff seeks special damages for the demurrage and detention charges for container no. IPXU 3932405 in the sum of RM39,320.

[141] The learned SFC objects to the claim because the tax invoice for the said charges was marked as "ID17" during the trial and the maker of the invoice was not called as a witness during the trial.

[142] For the same reasons as for its decision to admit the invoices for the goods as evidence, this court pursuant to its powers under s. 73A of the Evidence Act 1950, also orders that the tax invoice for demurrage and detention charges for container no. IPXU 3932405 be admitted as evidence. This court finds that it can be reasonably inferred that the said tax invoice is for demurrage and detention charges for container no. IPXU 3932405 based on the fact that the bill of lading (in bundle B/p. 103: marked as exh. "P5" during the trial) for container no. IPXU 3932405, shows the same information as on the tax invoice, namely, that the container was shipped on the vessel Teera Bhum from Singapore to Port Klang (Northport); the shipper of the container is Starlink Import & Export Pte Ltd; and the gross weight of the beer in the container is 19,125kgs.

[143] The demurrage and detention charges were incurred by the plaintiff as a direct result of the defendants wrongful and unlawful continued seizure of the containers.

[144] Accordingly, the sum of RM39,320, for the demurrage and detention for container no. IPXU 3932405, is hereby awarded to the plaintiff.

Handling Charges

[145] The plaintiff seeks special damages for the container handling charges in the sum of RM5,666.40 that were imposed by the shipping companies for the containers shown in copies of the tax invoices in bundle B at pp. 90, 93, 96, 98, 108 and 111, and bundle C at p. 4.

[146] The tax invoices at bundle B at pp. 90, 93, 96, 98, 108 and 111, were admitted as evidence during trial and marked as exh. "P7". The tax invoice in bundle C p. 4 was marked as an "ID".

[147] This court finds that the container handling charges that were charged by the shipping companies were not as a result of the defendants' continued seizure of the containers. They were issued together with the bills of lading, the invoices and the packing lists and form part of the normal charges by shipping companies for the shipment of goods by containers.

[148] Accordingly, the plaintiff's claim for the sum of RM5,666.40 for the container handling charges is disallowed. A

General Damages

[149] The plaintiff seeks general damages to be assessed by the court for damage to its reputation with its clients when the shipping company, Oceanhub Shipping Pte Ltd had sued the consignor, Aurum Mestika Sejati Pte Ltd in Singapore for failure to return the empty containers to the shipping liner's nominated depot in Malaysia. B

[150] It is a long settled legal principle that to claim damages for breach of reputation, a person must institute a civil action for the tort of defamation against the alleged tortfeasor. Only when liability for defamation has been established, is the plaintiff entitled to general damages for damage to its reputation: see *Defamation Principles and Procedure in Singapore and Malaysia*, Doris Chua, LexisNexis, 2016. C

[151] The plaintiff did not file an action for defamation against the defendants. Accordingly, the plaintiff's claim for damages against the defendants for its alleged breach of reputation resulting from the wrongful seizure of the goods is dismissed. D

Exemplary Damages E

[152] The House of Lords in *Rookes v. Barnard (No 1)* [1964] AC 1129 recognised that exemplary damages may be awarded in three categories, namely:

(i) where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the Executive or the servant of the Government; F

(ii) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; or

(iii) where a statute has expressly authorised the award of exemplary damages. G

[153] The principle in *Rookes v. Barnard (No 1)* has been accepted and applied by our courts. In *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179; [2021] 5 MLJ 937; [2021] 7 AMR 857, the Federal Court held: H

> As laid down in *Rookes* (*supra*), exemplary damages is to be awarded in three categories of cases, to wit, *when it is statutorily provided for, when the loss is occasioned by the oppressive, arbitrary or unconstitutional conduct of government servants and when the defendant's conduct was profit-orientated.* I
>
> (emphasis added)

[154] The Court of Appeal in *Sistem Televisyen Malaysia Bhd & Ors v. Nurullah Zawawi & Anor* [2015] 9 CLJ 357; [2015] 6 MLJ 703; [2015] 6 AMR 372, per Azahar Mohamed JCA (as he then was) held:

> [31] The most important authority for the award of exemplary damages is the House Lords decision in *Rookes v. Barnard (No 1)* [1964] AC 1129. This decision recognised three broad categories where exemplary damages may be awarded. *The first category is of those cases; where the plaintiff is injured by the oppressive, arbitrary or unconstitutional action by the executive or the servant of the government. The second category is comprised of those cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. The third category is where a statute has expressly authorised it.* (emphasis added)

[155] The plaintiff suffered loss as a result of the defendants' refusal to release the containers after it had paid the compound for all the containers.

[156] Based on the facts and circumstances of this case, this court had found that the defendants' action in refusing to release the goods after the plaintiff had paid the compound and its continuous seizure of the goods is wrongful and unlawful.

[157] However, the plaintiff has not provided any evidence to show that the defendants' conduct in its continued seizure of the goods was oppressive, arbitrary or unconstitutional.

[158] Accordingly, the plaintiff's application for exemplary damages is dismissed.

Findings On Issue (IV)

[159] For the above reasons, this court finds on Issue (IV), the plaintiff is entitled to the following special damages:

(i) the sum of RM1,533,249.80, which is equivalent to the value of the goods in 15 out of the 20 containers seized, as compensation for the continued seizure of the goods; and

(ii) the sum of RM39,320 being charges for demurrage and detention for container no. IPXU 3932405.

[160] The plaintiff's claim for container handling charges as special damages, general damages for damage to its reputation, and exemplary damages are dismissed.

Decision

[161] Accordingly, for all the above reason, this court makes the following orders:

(i) It is declared that the defendants' continuous seizure of the liquor and cigarettes in the 20 containers since 23 May 2018 to date is unlawful and invalid.

(ii) The defendants are to pay the plaintiff the sums of RM1,533,249.80 as compensation for the continued seizure of the goods and RM39,320 for demurrage and detention for container no. IPXU 3932405.

(iii) Interest at the rate of 5% per annum on the sums ordered to be paid from the date of the filing of the writ until full settlement.

[162] The defendants are ordered to pay the plaintiff costs in the sum of RM30,000.

So ordered accordingly